

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBJ 24 of 2008

IN THE MATTER of an Application by
KAMLESH CHAND for leave to Apply for
Judicial review under Order 53 Rule (2) of the
High Court Rules of Fiji

AND

IN THE MATTER of the decision of the Public
Service Appeals Board dated 6th May 2008
disallowing the appeal of the Applicant against
the provisional promotion of Emele
Daunivavana to the post of Assistant Account
Officer, Ministry of Education, Vacancy
No.152/2007.

BETWEEN:

THE STATE

AND:

PUBLIC SERVICE APPEALS BOARD

First Respondent

AND:

THE PERMANENT SECRETARY FOR
FINANCE, NATIONAL PLANNING
AND SUGAR INDUSTRY

Second Respondent

EX PARTE:

KAMLESH CHAND

Applicant

Coram: Hickie, J

Date of Hearing: 13 June 2008

Appearances: Applicant in person
Mr J. Bisa for the First Respondent
Ms K. Naidu for the Second Respondent

Date of Decision: 20 June 2008

JUDGMENT

THE APPLICATION

- [1] This is an application by **KAMLESH CHAND** (“the Applicant”) filed on 15 May 2008 in the High Court at Suva, seeking
- (a) **That Leave be granted to apply for Judicial Review** pursuant to Order 53 of the High Court Rules in respect of a decision of the First Respondent (the Public Service Appeals Board) dated 6 May 2008 disallowing the Appeal of the Applicant against the provisional promotion of **EMELE DAUNIVAVANA** to the post of Assistant Accounts Officer, Ministry of Education, Vacancy no. 152/2007; and
- (b) **That if Leave be so granted, then the Leave to operate as a Stay** of the abovementioned decision to maintain the status quo prevailing prior to 6 May 2008, until the hearing and final determination of the within Judicial Review.
- [2] **The Grounds upon which the Applicant is seeking relief** were also filed on 15 May 2008 and set out as follows:
- (a) *“That the First Respondent has failed to comply with the principles of natural justice and took into consideration irrelevant factors whilst disregarding relevant factors”;*
- (b) *“That it failed to exercise its statutory powers lawfully, as such it has exceeded its jurisdiction and abused its discretionary powers”;*
- (c) *“That it was required by Law [sic] to be fair in all aspects of the appeal process and accord natural justice to both parties and its failure to do so amounts to procedural impropriety;”*
- (d) *“That the decision is most unreasonable that no reasonable tribunal could have reached”;*
- (e) *“That it acted arbitrary [sic], in bad faith, and ultra vires as such the decision is a nullity”;*
- (f) *“That further, it did not take into consideration the following relevant matters:-*
- i. That procedural fairness required the Respondent to be impartial and independent in the discharge of its statutory functions.
 - ii It failed to provide legitimate reasons for its decision not to allow the appeal as required by law.
 - iii. It committed an error of law in failing to comply with the mandatory provisions of section 26(9) of the *Public Service Appeal Act.*”

- [3] **The Applicant also filed on 15 May 2008 an Affidavit in support** deposing in summary as follows:
- (a) That the said vacant position of Assistant Accounts Officer was advertised on 30 June 2007;
 - (b) That the selection "was not based on merit and taken [sic] into account irrelevant factors and disregarded relevant considerations which were in favour of the applicant";
 - (c) That on 21 January 2008, the Applicant filed an appeal which was conducted by the Public Service Appeals Board on 15 April 2008;
 - (d) That by letter dated 6 May 2008, the Applicant was informed "that his appeal had been disallowed and the only reason given [was] ... 'the provisional promotee has an edge in terms of better interview results'";
 - (e) That the interview did "not form the sole criteria of the promotion process" and that there were "other relevant aspects which forms the crucial basis of any promotion but the first and second respondents had deliberately disregarded and ignored these relevant factors";
 - (f) That the First Respondent "failed to give due consideration" to section 140 of the Constitution and Regulation 5 of the Public Service Regulations, 1999;
 - (g) That there was a "denial of natural justice"; and
 - (h) That there was an "error of law".

NOTICE OF OPPOSITION

- [4] Both Respondents each filed a Notice of Opposition.
- [5] **The Grounds of Opposition of the First Respondent** were filed on 26 May 2008 and set out as follows:
- (a) *"That the Applicant is seeking for a stay order to review the decision of the "Board" made on 6th May, 2008 wherein it disallowed the appellant [sic] appeal on the grounds that the provisional promotee has the edge in terms of [a] better interview result";*
 - (b) *"That the applicant in his application predominantly raises questions on procedural fairness, natural justice, unreasonableness and biasness [sic]";*

(c) *"That Part 5 Section 26 clause (1)-(12) of the Public Service Act 1999 spelt out that [sic] procedures of Appeal Hearing and the Board is bounded [sic] by the Act to reach decision whether to allow or disallow an appeal and in this case the appellant [sic] case was disallowed";*

(d) *"That the 'Board' is legality [sic] bounded [sic] to conduct its duties with strict observation and respect the constitutional rights of individual [sic] and the reason for its decision was procedurally fair; reasonable, proper, rational and also taken [sic] into consideration the application of the principle of natural justice and the decision is not erroneous as contended by the applicant";*

(e) *"That the [sic] we pray that the application be summarily dismissal [sic] at leave stage."*

[6] **The Grounds of Opposition of the Second Respondent** were filed on 23 May 2008 and set out as follows:

(a) *"the Applicant does not have an arguable case established on any of the grounds sought for judicial review of the relevant decision";*

(b) *"this is not a proper a proper judicial review but rather an appeal on the merits. Challenge is as to merit and not as process by which the Respondent made the decision"..*

APPLICANT'S RESPONSE

[7] The Applicant filed a separate response to each Notice of Opposition.

[8] In relation to **the Grounds of Opposition of the First Respondent, the Applicant submitted** on 10 June 2008 as follows:

(a) *"That the Public Service Appeal Board may allow or disallow and [sic] appeal only after taking into consideration all relevant factors but in the instant case it took into account irrelevant and extraneous considerations";*

(b) *"Further, the Board was required under Section 26(9)(c) of the Public Service Appeal Act to give legitimate reasons for its decision after reviewing the decision making process and the manner in which the decision was reached, which I*

submit was not transparent, equitable and fair. In this regards I have put forward a justifiable case that has exceptional grounds of merit for judicial review”;

(c) “That I have exhausted all available avenues in the remedial process, except for the Judicial Review process which is the inherent jurisdiction of this Honourable Court, therefore my application is not an abuse of process”;

(d) “That I verily believe the Board had exceeded its jurisdiction and abused its statutory powers when it did not consider relevant factors by substantially ignoring my submission but took upon itself to consider on appeal the application anew or afresh and decided on appeal to deal with the matter itself by deciding who should be promoted in the most unreasonable manner”;

(e) “That I further say that the Board was required by law to be fair in its deliberation and take into consideration only relevant factors as required of a judicial body. It had been upheld in **R. v Civil Service Appeal Board Ex-parte Cunningham** (1991) 3 ALL E.R. 310 CA at 311 where the Court of Appeal upheld that the civil service appeal board carried a judicial function as Lord Donaldson MR put it on page 318 at letter ‘h’

Accordingly, I take as my starting point a consideration of what is the character of the decision making body. The answer is that it is not domestic ... nor is it any way administrative or even quasi-judicial, it is a fully judicial body’.”

[9] In relation to the **Grounds of Opposition of the Second Respondent, the Applicant submitted** on 4 June 2008 as follows:

(a) “That I have in my ex-parte application, statement and affidavit in support filed in this Honourable Court on 15th May, 2008 established beyond reasonable doubt a very strong arguable case based on exceptional grounds of merit a justifiable case for Judicial Review as I have exhausted all available alternative remedies in the preva [sic]”;

(b) “That I have further established that the First Respondent has acted ultra vires, exceeded its jurisdiction and abused its discretionary powers in making the most unreasonable and irrational decision. I was denied natural justice and there was

procedural impropriety in the process adopted by both the first and second respondents in reaching their respective decisions”;

(c) “That my application for Judicial review is not an appeal but a review of the decision making process and the unreasonable manner in which the said decision was made by the First Respondent. It had breached the rules of natural justice, procedural fairness and had taken into account irrelevant consideration [sic] whilst disregarding all relevant factors”;

*(d) “That it has been upheld by Lord Templeman in **Reg v Inland Revenue Commissioners, Ex parte Preston** (1985) A.C. 835 AT 862: ‘Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers’”;*

(e) “That the Honourable Court has the inherent jurisdiction to consider the grant of Leave to operate as [a] Stay until the final determination of the within judicial review pursuant to Order 53 Rule 3 (8) and (b) of the High Court Rules”.

HEARING OF APPLCIATION FOR LEAVE

- [10] I listed the matter on an inter partes basis before me on 13 June 2008 to hear from the respective parties as to whether they wished to add anything further in relation to their submissions.
- [11] The Applicant relied upon his written submissions noting that the main thrust was the “unreasonable manner” in which the decision was made by the Public Service Appeals Board.
- [12] Both the First and Second Respondents also relied upon their brief submissions with the Second respondent emphasising:
- (a) That this was not a proper matter for judicial review; and
 - (b) That the Applicant was trying to seek judicial review on “the merits of the decision” rather than “the process” as to how the decision was arrived at.

[13] I then adjourned advising all parties that judgment would be on notice.

THE LAW

[14] There is particular force in the arguments of Counsel for the Second Respondent both in her submissions and reinforced when she appeared before me, that the Applicant is trying to seek judicial review on “the merits of the decision” rather than “the process” as to how the decision was arrived at. This was reinforced by the submissions of the Applicant submitted on 4 June 2008 outlined above where he states *“That I have ... established beyond reasonable doubt a very strong arguable case based on exceptional grounds of merit [and] a justifiable case for Judicial Review as I have exhausted all available alternative remedies in the preva [sic]”*;

[15] In that regard, I am mindful of the decision of Pathik J in *State v Public Service Commission, Ex parte Tokaibai* [2005] FJHC 393; HBJ0016 of 2005 (30 November 2005), wherein he noted at page 12 of his judgment as reported on Paclii (unfortunately, the judgment on paclii has no paragraph numbers and there have been no *Fiji Law Reports* published since 2001) that:

The law on the subject of exercise of administrative powers in judicial review particularly in the filling of ‘Posts’ as here has been well put and summarized by Brennan J in Attorney-General (N.S.W.) v Quinn (1990) 170 C.R.R. at p.35 as follows:

“The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual’s legitimate expectations against adverse exercises of the powers? I have no doubt that the answer is: none, judicial review provides no remedies to protect interests, failing short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository.”

The PSC was well within its powers in the manner in which it considered the applications. The process and the procedure by which it arrived at its decision cannot be faulted.

What the Commission is required to do in considering an application of this nature has been well stated by the Court of Appeal in Anuradha Charan v Public Service Commission & Others, Civil Appeal No. 2 of 1992 when it said:

“The Commission must evaluate evidence of all aspects of the candidate’s abilities, qualifications and attitudes. Having done so, they are left with a discretion to decide the suitability of a candidate for the post under consideration. That discretion must include the right to decide, if based on proper grounds, that despite fulfilling all the stated qualification, the candidate may still not be suitable.”

*Considering the evidence and the nature of the application it did not warrant the giving of reasons in the form expected by the applicant for the decision reached by the PSC. It was purely a question of choosing between the two applicants who both had good qualifications and who were quite experienced in their respective areas. The PSC chose Mr. Sami after proper deliberation. It **cannot be said that the decision was so unreasonable that it should be disturbed** in any way. **A fair hearing was given to the applicants** by the PSC and the Panel.*

For these reasons the application for judicial review is dismissed.”

[16] I can only concur with the above reasoning. I will, however, to assist the Applicant further in understanding how I have reached this decision briefly set out four observations made by Pathik J in Tokaibai (supra) as to the law:

(a) **“Judicial review is not an appeal”** (Tokaibai page 6)

A review on the procedure undertaken is not an appeal on the merits of the decision: *“In a judicial review the Court has a **supervisory jurisdiction** and that is ‘to review’. It is not an appeal on the facts. The Court in a judicial review is concerned with legality rather than the merits of the decision”;*

(b) **“Judicial review concerns not the decision but the manner of reaching it”**
(Tokaibai page 6)

Having read the Applicant's Affidavit and annexures thereto, in particular Annexure "B", the Submission by the Ministry of Finance, National Planning, Sugar Industry and Public Utilities (Water & Energy) to the PSAB, I can only agree. As Pathik J held in Tokaibai:

"I do not find anything wrong in the procedure applied. There was no denial of natural justice to the applicant.

As I said this is not an appeal but an application for judicial review and on such an application "it is the process by which the determination was reached which must be wrong before the court can quash it" (R v Immigration Appeal Tribunal, ex p Enwia [1984] 1 WLR 117, 136F).

It has to be borne in mind that:

'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping the power" (Lord Brightman in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, 1173F).'

*The applicant has been labouring the point to the effect that PSC has come to a **wrong decision** in complete disregard of the applicant's qualifications and experience in comparison to the successful applicant.*

The applicant is thereby endeavouring to persuade the Court that it should reverse the decision. This is the very thing ... that the Court cannot do. "It is not a question whether I, as a member of this court agree with him or not" (Sir Thomas Bingham MR in R v Home Secretary, ex p Bateman & House (1955) 7 Admin LR 175, 183 G-H). Also as Lord Donaldson MR said 'it is quite beside the point to consider whether I would have reached the same conclusion'. (R v General Medical Council ex p Colman (1990) 1 All ER 489, 511d)."

(c) "Judicial review is not concerned with 'the merits'" (Tokaibai page 8)

It is not this Court's function to "second guess" the PSAB. In assessing the merits of Applicant's for the position, that is their role not the Court's. As Pathik noted in Tokaibai citing Fordham (Michael Fordham, Judicial Review Handbook, 3rd Edition, at page 254) where it was stated:

"What is meant by 'the merits' are those questions (especially fact, judgment, discretion and policy) which the public body has the role of deciding for itself".

(d) Procedural impropriety (Tokaibai page 9)

The Applicant complains as to the “unreasonable manner in which the said decision was made by the First Respondent”. Again, I can only cite the words of Pathik J in Tokaibai:

“The applicant was not denied natural justice, he was given the opportunity of appearing before the interviewers ... There was procedural fairness and no denial of natural justice ...

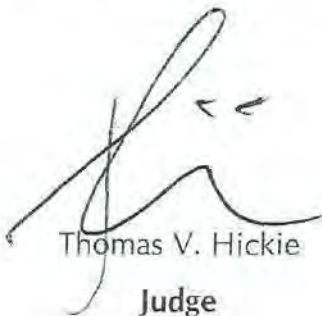
*The applicant says that the decision is ‘irrational’ and ‘unreasonable’ but on the evidence I do not find it to be so or Wednesbury unreasonable to upset the decision. It is not a decision that is ‘so unreasonable that no reasonable authority could ever have come to it.’ [Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 KB 223 at 234]. The Court if it does interfere, it does so ‘not as an appellat authority to override a decision ... but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.’ (Wednesbury case *ibid*).”*

[17] Accordingly, the Orders of this Court are as follows:

1. That the Application for Leave to be granted to apply for Judicial Review is refused.

I will now hear the parties on the question of costs.




 Thomas V. Hickie
Judge